Supreme Court of the United States.

OCTOBER TERM, 1941.

GEORGE H. MASON, TRUSTEE IN BANKRUPTCY OF WORCESTER MOTOR CO., INC.,
Petitioner,
v.
JOHN WYLDE ET ALS.,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was filed by the Superior Court judge who found for the plaintiff (Record, p. 14). The opinion of the Supreme Judicial Court of Massachusetts, a copy of which is to be found in the record (page 15 *et seq.*), was handed down on February 24, 1941, and is printed in the Massachusetts Advance Sheets for the current year commencing at page 367 thereof.

Jurisdiction.

An action in a state court to recover a preference presents a federal question reviewable in the Supreme Court of the United States.

Rector v. *City Deposit Bank Company*, 200 U.S. 405.

Eau Claire National Bank v. *Jackman*, 204 U.S. 522.

Such an action is the present case (Record, p. 1). It is evident from the requests for rulings filed by the respondents (Record, pp. 12-13, *cf.* Nos. 15, 21, 25) and from the opinion of the Supreme Judicial Court that this federal question was the crux of the case and that the whole decision rests ultimately upon the answer to the same. Thus, the court said:

> "A primary question for determination is the date as of which the 'transfer' is to be judged in determining its voidable character" (Record, p. 25).

The court also said:

> "Since a finding was not warranted that the company was insolvent when it gave the 'trust receipts' on July 22, 1932, the plaintiff, the trustee in bankruptcy has failed to prove that the giving of the 'trust receipts' constituted a voidable preference" (Record, p. 29).

The petitioner, having in mind this federal question, invokes the jurisdiction of this Court to review the judgment of the Superior Court as ordered by the rescript of the Supreme Judicial Court, under United States Code, Title 28, section 344 (b).

Statement of the Case.

The case is stated in the petition (*ante*, pp. 1-4).

Specification of Errors.

The issue presented is stated in the petition (*ante*, pp. 5-6).

Summary of the Argument.

I. The prior cases before this Court cited by the Supreme Judicial Court in support of its conclusion on the issue

raised herein differ materially from the present case on their facts and do not control the decision in the present case.

II. The prior cases before this Court cited by the Supreme Judicial Court of Massachusetts in support of its conclusion on the issue raised herein were based on the federal bankruptcy act as it existed prior to the amendment of 1910, and therefore, on the decided cases, the case can be decided in favor of the petitioner.

III. In view of the policy behind the provisions of the bankruptcy act as evidenced by the trend of amendments thereto and the dictates of sound policy, the case should be decided in favor of the petitioner and the secret lien in the form of an unrecorded chattel mortgage declared a voidable preference.

Argument.

I.

THE PRIOR CASES BEFORE THIS COURT CITED BY THE SUPREME JUDICIAL COURT IN SUPPORT OF ITS CONCLUSION ON THE ISSUE RAISED HEREIN DIFFER MATERIALLY FROM THE PRESENT CASE ON THEIR FACTS AND DO NOT CONTROL THE DECISION IN THE PRESENT CASE.

The cases which were cited by the Supreme Judicial Court of Massachusetts in support of the proposition that the elements of a preference were to be determined as of the date of the execution of the unrecorded chattel mortgages rather than as of the date of the taking possession thereunder differ on their facts from the present case in a very material respect. In all of those cases the chattel mortgage either had been recorded or had been executed prior to the four months before bankruptcy.

Thus, in the leading case on this matter and one involving a Massachusetts transaction, the mortgage was executed about two years before bankruptcy.

Humphrey v. *Tatman,* 198 U.S. 91, 92.

In a second case the mortgage was executed about nine years before bankruptcy.

Thompson v. *Fairbanks,* 196 U.S. 516, 518.

In a third the security arrangement was entered into about four years before bankruptcy.

Sexton, Trustee, v. *Kessler & Company, Limited,* 225 U.S. 90, 96.

In the most recent case the conditional sales contract was recorded as required by statute.

Finance & Guaranty Company v. *Henry W. Oppenhimer,* 276 U.S. 10, 11.

Thus none of the prior cases before this Court involved a situation where both the execution of the unrecorded chattel mortgage and the taking possession thereunder occurred within the four months prior to bankruptcy.

II.

THE PRIOR CASES BEFORE THIS COURT CITED BY THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN SUPPORT OF ITS CONCLUSION ON THE ISSUE RAISED HEREIN WERE BASED ON THE FEDERAL BANKRUPTCY ACT AS IT EXISTED PRIOR TO THE AMENDMENT OF 1910, AND THEREFORE, ON THE DECIDED CASES, THE CASE CAN BE DECIDED IN FAVOR OF THE PETITIONER.

It is further significant to note that, in the prior cases of the taking possession under unrecorded chattel mortgages,

this Court was dealing with the bankruptcy act prior to the amendments of 1903 and 1910.

Cf. *Humphrey* v. *Tatman* (*supra*).
Thompson v. *Fairbanks* (*supra*).
Sexton, Trustee, v. *Kessler & Company, Limited* (*supra*).

Whatever may have been the law under the original Act of 1898, the effect of the amendment of 1910 should be authoritatively determined by this Court.

The amendment of 1903 (Act of February 5, 1903, c. 487, sec. 13, U.S. Sts. at Large, part 1, p. 799) to the bankruptcy act, 11 U.S.C. sec. 96, sub. (a), provided:

> "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The effect of this amendment, according to the decided cases, was merely to extend the four months' period during which the transfer was to be subject to attack rather than to set a date as of which the elements of a voidable preference were to be determined. Although many lower courts held this point of view, the Supreme Court did not decide the point, as the case raising it was disposed of on other grounds.

Page v. *Rogers,* 211 U.S. 575.

Remington had a different view of the effect of the amendment:

> "After the Amendment of 1903 it would have seemed on principle that since the Amendment made the four months an essential element of the very definition of a

preference itself, the date of the recording or filing ought to have been taken as being the date of the consummation of the transfer so far as creditors in bankruptcy were concerned, and to such effect were some of the decisions after that Amendment, even before the further Amendment of 1910."

4 Remington on Bankruptcy, sec. 1790, at pp. 744-745.

Cf. *English* v. *Ross*, 140 Fed. 630.

The Act of June 25, 1910, c. 412, sec. 11, 36 U.S. Sts. at Large, part 1, p. 842, made a radical change in 11 U.S.C. sec. 96, sub. (b), and provided that, if the stated elements of a preference were present "at the time of the . . . recording or registering of the transfer if by law recording or registering thereof is required," such transfer is voidable.

The effect of this amendment of 1910 to 11 U.S.C. sec. 96, sub. (b), is to make "the date of the recording, where recording is required under State law, the date at which the trustee is to prove the existence of all the elements of a preference . . . truly the right date, for . . . it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed several years beforehand."

4 Remington on Bankruptcy, sec. 1791, at pp. 756-757.

Explaining the time of transfer, Remington states:

"There are, in reality, two times of transfer in such cases. As between the transferer and transferee, obviously the time of the transfer is the time of the original execution and delivery of the instrument to the grantee

or transferee, regardless of its registration; but as to creditors, or the rest of the outer world, the 'transfer' is, by the policy of the State recording statutes not a complete 'transfer' at all until recorded, until delivery to the public recorder—then, and not until then, the creditor signifying to outside parties, to all others who might become interested in his assets, the effectual separation of the liened property from the rest of the debtor's assets. This, it must be conceded, is the basic principle upon which rest the recording statutes of the different States. It is also the basic principle of the right to legislate against secret liens. Likewise in a rightly construed bankruptcy preference statute, the great object should be to make clear that the 'transfer' so far as outside parties becoming interested in the estate are concerned, is not complete or perhaps is not even to be considered a 'transfer' at all, in cases where State laws require recording as against creditors, until delivery of the instrument to the recorder for registration."

4 Remington on Bankruptcy, sec. 1791, at pp. 756-757.

Thus it is clear that the policy behind the amendment of 1910 was to strike down secret liens by compelling a separation of the property covered by the lien by means of public recording.

The importance of this change in the bankruptcy laws is simply this: Under the act as it existed at the time the Supreme Court decided the prior cases of the taking possession under an unrecorded mortgage, if the mortgagee had recorded rather than taken possession he would have defeated the trustee. Since these cases the amendment of 1910 compels the contrary result and protects the trustee where there

is recording and the amendment is applicable. The situation where possession is taken under an unrecorded chattel mortgage is not expressly covered by the terms of the bankruptcy act as it existed at the time of the taking possession in the present case.

III.

IN VIEW OF THE POLICY BEHIND THE PROVISIONS OF THE BANKRUPTCY ACT AS EVIDENCED BY THE TREND OF AMENDMENTS THERETO AND THE DICTATES OF SOUND POLICY, THE CASE SHOULD BE DECIDED IN FAVOR OF THE PETITIONER AND THE SECRET LIEN IN THE FORM OF AN UNRECORDED CHATTEL MORTGAGE DECLARED A VOIDABLE PREFERENCE.

It is submitted that the trend of the legislative amendments to 11 U.S.C. sec. 96 indicates a policy against secret liens and that these amendments should receive such construction as will effectively make this possible.

Clearly, under the bankruptcy act as amended in 1910, if the respondents here had recorded their chattel mortgages on the date on which they took possession thereunder, the elements of a preference would be determined as of this later date. Such being the case, is it proposed that the respondents shall defeat the trustee by virtue of their fault in not complying with the recording requirements? The logical answer, in view of the policy against secret liens and the fact that all the dangers of defeating the just claims of creditors in bankruptcy are fully as extensively and fully as sinisterly present where possession is taken under the unrecorded chattel mortgage as where the mortgage is recorded, is that the amendment of 1910, by implication, was meant to make the date of taking possession the date as of which the elements of a preference are to be determined, where such possession is taken under an unrecorded chattel mortgage and where the applicable law required recording. Certainly this

should be the result where, as here, both the execution of the mortgage and the taking possession thereunder occurred within the four months prior to bankruptcy.

Conclusion.

It is therefore respectfully submitted that the decision of the Supreme Judicial Court in reversing the judgment of the Superior Court was unsound on an important question of law and the issue involved should be determined by this Court.

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